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HONORABLE PAUL B. SNYDER
Location Tacoma
Chapter 11
Hearing Date: April 19, 2010
Response Date: 9:00 a.m.
Hearing Time: April 12, 2010

8 UNITED STATES BANKRUPTCY COURT
9 WESTERN DISTRICT OF WASHINGTON

10 In re

11 LIQUIDATION OUTLET, INC.

12 Debtor.

No. 10-42279

DEBTOR'S MOTION FOR ORDER
(1) AUTHORIZING INCURRENCE
OF SECURED INDEBTEDNESS
WITH PRIORITY OVER ALL OTHER
SECURED INDEBTEDNESS AND
WITH ADMINISTRATIVE
SUPERPRIORITY, (2) GRANTING
SECURITY INTERESTS, (3)
PROVIDING FOR ADEQUATE
PROTECTION, (4) APPROVING
AGREEMENTS RELATING TO THE
FOREGOING AND
(5) GRANTING RELATED RELIEF

19 **NOTICE**

20 TO: The Clerk of the Court
21 AND TO: All Creditors and Parties-In-Interest
22 AND TO: U. S. Trustee

23 PLEASE TAKE NOTICE that Liquidation Outlet, Inc. ("Debtor") has filed a Motion (the
24 "Motion") For entry of the proposed order (the "Order") in substantially the form attached hereto
25 as **Exhibit "A"** (1) Authorizing Incurrence of Secured Indebtedness Over All Other Secured
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1 Indebtedness and With Administrative SuperPriority, (2) Granting Security Interests, (3)
2 Providing for Adequate Protection, (4) Approving Agreements Relating to the Foregoing and (5)
3 Granting Related Relief. You and each of you are notified that unless objection is made, filed
4 herein and served on Debtors' on or before April 19, 2010, Debtor will proceed to enter into the
5 debtor-in-possession financing as detailed below.

6
7 The Debtor will proceed to enter an order with this Court authorizing the Debtor to enter
8 into Debtor in Possession Financing and Granting Priority to LOI Capital, LLC at a hearing
9 scheduled for April 19, 2010 at 9:00 a.m. (the "Hearing"), in the United States Bankruptcy
10 Court, Room H, 1717 Pacific Avenue, Tacoma, Washington. Anyone having an objection to the
11 Debtor's Motion must file a written objection with the Court and serve a copy on Debtor's
12 counsel at the address indicated below, no later than April 12, 2010. Failure to file such written
13 objection by the response date will allow movant to proceed with entering into the DIP (as
14 defined below) and granting priority to LOI Capital, LLC without further notice of hearing.

15 **MOTION**

16
17 COMES NOW Debtor pursuant to 11 U.S.C. § 364 and FBRP 2002 and 4001 and hereby
18 moves the Court for an order authorizing the proposed debtor-in-possession ("DIP") financing
19 and granting priority to LOI Capital, LLC ("Lender"). Debtor has requested that Lender provide
20 DIP financing in an amount up to \$2,000,000.00 in order to provide Debtor with the necessary
21 capital to maintain its operations until a sale of Debtor's assets can be completed to Lender.
22 Debtor is asking for approval of this sale in a separate motion being heard simultaneously.
23 Additionally, Debtor is asking the Court grant first position lien on all of the assets of the Debtor,
24 ahead of any currently existing secured liens or encumbrances. The factual circumstances
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1 surrounding Debtor's need for the DIP, and an overview of the specific terms of this financing
2 are all listed below.

3 **I. STATUS OF THE CASE AND JURISDICTION**

4 1. Debtor continues in the possession of its property and is operating and managing
5 the business as debtor and debtor-in-possession pursuant to sections 1107(a) and 1108 of the
6 Bankruptcy Code.

7 2. This Court has jurisdiction over this Motion under 28 U.S.C. §§ 157 and 1334.
8 This matter is core within the meaning of 28 U.S.C. §§ 157(b)(2)(A) and (O).

9 3. Venue of these proceedings and this Motion is proper in this district pursuant to
10 28 U.S.C. § 1408.

11 4. The statutory predicates for the relief sought herein are Sections 105, 361, 362,
12 363, 364, 507, and 552 of the Bankruptcy Code and Rule 4001(c) of the Bankruptcy Rules.

13 **II. FACTUAL BACKGROUND**

14 **A. Circumstances Regarding Need for DIP Financing**

15 5. Debtor is a Washington corporation incorporated on June 5, 1992 and has been
16 engaged since that time in the business of opening and operating retail stores throughout the
17 states of Washington and Oregon under the trade name "The Dollar Store." Debtor currently
18 operates at 38 different retail locations. Debtor employs 328 people throughout Washington and
19 Oregon with a twice monthly payroll of \$183,549.74. Debtor's main office and distribution
20 center is located at 1025 Valley Avenue, Puyallup, Washington 98371.

21 6. The current economic recession has proved devastating to Debtor. Debtor's
22 business is dependent upon its ability to acquire a continuous supply of merchandise to restock
23 Debtor's shelves in appropriate mixes so that inventory turnover occurs rapidly. Debtor's rents
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25
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1 payable went from \$441,600 in 2006 to \$1,129,850 in 2007, a 256% increase. Debtor was able to
2 absorb that additional liability because it leases its office and warehouse space from GA
3 Development, LLC, ("GA Development") which is owned by the sole shareholder of Debtor,
4 Mr. Gary Woodring. Debtor also leases its Yakima store location from Mr. Woodring. For the
5 last several years, GA Development and Mr. Woodring have received checks from Debtor for
6 payments under their respective leases, but did not present them for payment. Instead, they held
7 the checks to allow Debtor to improve its cash position.
8

9 7. Debtor's sales went from \$32,157,000 in 2008 to \$25,637,000 in 2009, a 20%
10 decrease. Debtor's income from operations went from \$192,286 in 2008 to (\$2,902,971) in 2009.
11 Net income in 2009 was (\$2,940,915). In 2008 it was 104,427. In 2007 net income was
12 \$671,824.

13 8. Debtor's net cash used by operating activities in 2009 was (\$836,755). In 2008 it
14 was (\$206,273). As a result, Debtor had a decrease in inventory of \$1,200,993 in 2009, and a net
15 decrease in cash during 2009 of \$1,106,272, leaving Debtor with only \$343,527 in cash at the
16 end of 2009. Without a present ability to restock Debtor's inventory, the shelves in Debtor's
17 stores are thin and what merchandise is available is in product mixes not as desirable for its
18 customer base. Consequently, that merchandise remains on the shelves unsold longer than is
19 reasonable under Debtor's business model. Debtor is therefore losing customer base because
20 customers stop coming to Debtor's stores, which exacerbates Debtor's financial difficulties.
21

22 9. Beginning in November of 2009, Debtor became unable to timely make payments
23 under Debtor's store leases. That problem has accelerated in 2010. Debtor is currently in default
24 under most of its leases. A majority of those landlords have sent letters or notices designed to
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1 begin unlawful detainer processes. In several cases, unlawful detainer actions have been filed
2 against Debtor.

3 10. Debtor has had a line of credit with US Bank since October, 2006 for the original
4 maximum amount of \$1,300,000. In July, 2008, US Bank required Debtor to reduce the
5 maximum loan amount to \$900,000 as a condition of renewing the line. In January, 2010, US
6 Bank informed Debtor that it would not renew the line of credit past its maturity date of January
7 31, 2010. After substantial negotiations, US Bank agreed to a short-term extension of the loan to
8 March 31, 2010. On that date, the entire unpaid balance on the line, which is roughly \$900,000,
9 will become due. It is secured against Debtor's inventory and cash collateral.
10

11 11. Over the course of the last three years, Debtor has engaged in an aggressive effort
12 to find a purchaser for Debtor assets. Within the last several weeks, Debtor has negotiated a
13 potential asset sale of assets with Hudson Capital Partners, based in Newton, Massachusetts and
14 its subsidiary corporation, LOI Capital, LLC, Lender herein. However, this sale requires Court
15 approval and entails a bidding process which will not be completed until approximately __ days
16 after approval the sale. Debtor has an immediate need to be able purchase inventory to maintain
17 existing operations and to build additional inventory in order to remain in business.
18

19 12. Lender has agreed to provide Debtor with pre-petition financing and DIP
20 financing to be used to assist Debtor in acquiring the inventory it needed to maintain its
21 operations. This presents Debtor's best chance of allowing a prospective purchaser, whether it is
22 Lender or another party, the time necessary to determine which stores should be closed, which
23 stores should be kept open in order to make the business profitable once again. **See Declaration**
24 **of Gary Woodring in Support of First Day Motions.**

25 **B. The Pre-Petition Financing**
26

1 13. On October 24, 2006 U.S. Bank provided a line of credit revolving loan in the
2 maximum amount of \$1,300,000. The U.S. Bank facility is governed by the terms of that certain
3 Loan and Security Agreement, dated as of October 24, 2006 (“U.S. Bank Prepetition Loan
4 Agreement”). The maximum amount of the line was subsequently reduced by U.S. Bank to
5 \$900,000. The maturity date for the U.S. Bank loan is March 31, 2010. As of March 24, 2010,
6 the outstanding balance under the U.S. Bank Prepetition Loan Agreement, excluding costs and
7 legal expenses for which Debtor is liable, is approximately \$700,000.00 (“U.S. Bank Prepetition
8 Claim”). Pursuant to the U.S. Bank Loan Agreement and a UCC-1 filed on October 31, 2006
9 with the Washington State Department of Licensing UCC division, U.S. Bank's Prepetition
10 Claim is secured by a first priority security interest in substantially all of Debtor's assets.

12 14. On March 23, 2010, the Lender provided Debtor with \$150,000 of pre-petition
13 financing (“Lender Prepetition Claim”). This prepetition facility is governed by the terms of a
14 certain Promissory Note (the “Lender Prepetition Loan Agreement”), dated March 15, 2010.
15 Pursuant to the Loan Agreement, a Security Agreement dated March 15, 2010, and a UCC-1
16 filed on or about March 15, 2010 with the Washington State Department of Licensing UCC
17 division, the Lender Prepetition Claim is secured by a second priority security interest in
18 substantially all of Debtor's assets.

20 **III.BANKRUPTCY RULE 4001 CONCISE STATEMENT**

21 15. By this Motion, Debtor requests:

22 (a) the entry of a proposed Order authorizing Debtor:

23 (i) to obtain postpetition financing up to an aggregate principal
24 amount not to exceed \$2,000,000.00 from Lender pursuant to the
25 terms of the that certain Debtor In Possession Credit and Security
26 Agreement (the “DIP Credit Agreement”) substantially in the form
 annexed hereto as **Exhibit “B”**, between Debtor and Lender;

- (ii) to grant Lender security interests in all of Debtor's presently owned and after-acquired property and Pre-Petition Collateral (collectively, the "Post-Petition Collateral") to secure any and all of the all the obligations of Debtor pursuant to the terms of the DIP Credit Agreement (the "DIP Obligations"); and
- (iii) to use the proceeds of the DIP to (i) payoff all of the obligations of the Debtor pursuant to the terms of the U.S. Bank Prepetition Loan Agreement, (ii) payoff all of the obligations of the Debtor pursuant to the terms of the Lender Prepetition Loan Agreement and (iii) provide Debtor with required liquidity sufficient to allow it to acquire merchandise and maintain its operations until the sale of its assets can be approved by the Court and a sale transaction can be closed; and
- (iv) to grant Lender priority in payment with respect to the DIP Obligations over any and all administrative expenses of the kinds specified in sections 503(b) and 507(b) of the Bankruptcy Code.
- (b) in accordance with Bankruptcy Rule 4001(c)(2), that this Court schedule the Hearing and approve notice with respect thereto.

16. The material provisions of the DIP are summarized as follows and set forth in the following sections of the DIP Credit Agreement and/or, as applicable, the Order:¹

- (a) Borrower: Debtor. *See* page 1 of the DIP Credit Agreement.
- (b) Lender: Lender. *See* page 1 of the DIP Credit Agreement.
- (c) Commitment: The Lender agrees, subject to the terms and conditions of DIP Facility and the Financing Order, to make advances to the Debtor from time to time from the date that all of the conditions set forth in Section 4.1 of the DIP Credit Agreement in the aggregate amount of \$2,000,000.00 *See* Section 2.1 of the DIP Credit Agreement.
- (d) Termination Date: means the earliest of (i) the April __, 2010, (ii) the date the Borrower repays the Obligations in full and terminates the Credit Facility, or (iii) the date the Lender demands payment of the Obligations, following an Event of Default. *See* page 8 of the DIP Credit Agreement.
- (e) Use of Proceeds: The Borrower shall use the proceeds of Advances for (i) payment in full of the US Bank Obligations, (ii) payment in full of the Pre-Petition Obligations, and (iii) funding post-petition operations strictly

¹ Capitalized terms used herein and not otherwise defined herein shall have the meanings ascribed to such terms in the DIP Credit Agreement.

1 in accordance with the Budget. No proceeds of any Advance may be
2 utilized by the Borrower to finance in any way any professional fees,
3 disbursements, costs or expenses incurred in connection with asserting,
4 investigating, or preparing, any claims or causes of action against the
5 Lender, or its counsel or advisors (including advisors to their counsel),
6 arising from or relating to the Pre-Petition Credit Agreement or this
7 Agreement, and/or investigating, challenging or raising any defenses to
8 the obligations or liens under the Pre-Petition Credit Agreement or this
9 Agreement. Notwithstanding the forgoing, any official committee(s)
10 appointed in the Chapter 11 Case shall have the ability to investigate such
11 matters subject to the terms of the Financing Order. *See* Section 2.8 of the
12 DIP Credit Agreement.

13 (f) Priority and Liens: Effective immediately upon the execution of the
14 Order, Lender shall be granted pursuant to sections 361, 362, 364(c)(2),
15 364(c)(3), 364(e)(3), and 364(d)(1) of the Bankruptcy Code, priming first
16 priority, continuing, valid, binding, enforceable, non-avoidable and
17 automatically perfected postpetition security interests in and liens on, all
18 present and after-acquired property of the Debtor of any nature whatsoever
19 and wherever located. *See* Order, at paragraph 2(f)(ii).

20 (g) Interest: The Debtor's obligations under the DIP Credit Agreement shall
21 bear interest at an annual interest rate equal to fifteen percent (15%). *See*
22 Section 2.3 of the DIP Credit Agreement.

23 (h) Events of Default: The Events of Default under the DIP Credit Agreement
24 include the following: (a) default in the payment of any amount owed by
25 the Borrower to the Lender as and when due under the DIP Credit
26 Agreement; (b) default in the performance, or breach, of any covenant or
agreement of the Borrower contained in the DIP Credit Agreement; (c)
any ownership interest of the Borrower shall be sold or transferred in any
transaction other than in accordance with the terms of the Asset Purchase
Agreement, or shall become subject to a Lien; (d) a Bidding Procedures
Order has not been entered by the Bankruptcy Court on or before [April 9,
2010]; (e) a Sale Order has not been entered on or before [April 9,
2010]; (f) a sale of all or substantially all of the Borrower's assets pursuant
to the terms and conditions of the Asset Purchase Agreement has not
occurred on or before [May 15, 2010]; (g) any representation or warranty
made by the Borrower in the DIP Credit Agreement or by the Borrower
(or any of its Officers) in any agreement, certificate, instrument or
financial statement or other statement contemplated by or made or
delivered pursuant to or in connection with the DIP Credit Agreement
shall prove to have been incorrect in any material respect when deemed to
be effective; (h) the rendering against the Borrower of an arbitration
award, a final judgment, decree or order for the payment of money in
excess of \$10,000 and the continuance of such arbitration award,
judgment, decree or order unsatisfied and in effect for any period of 30

1 consecutive days without a stay of execution; (i) the Borrower shall
2 liquidate, dissolve, terminate or suspend its business operation or
3 otherwise fail to operate its business in the ordinary course, merge with
4 another Person unless the Borrower is the surviving entity; or sell or
5 attempt to sell all or substantially all of its assets, without the Lender's
6 prior written consent; except as contemplated under the Asset Purchase
7 Agreement and Sale Order; (j) an event of default shall occur under any
8 Security Document; (k) default in the satisfaction of any Obligation owed
9 by the Borrower to the Lender hereunder; (l) the Lender believes in good
10 faith that the prospect of payment in full of any part of the Obligations, or
11 that full performance by the Borrower under the Loan Documents, is
12 impaired, or that there has occurred any material adverse change in the
13 business or financial condition of the Borrower; (m) the indictment of any
14 Director or executive Officer of the Borrower for a felony offence under
15 state or federal law; (n) the Borrower shall fail to comply or shall default
16 in the performance of any term of the DIP Credit Agreement, the Pre-
17 Petition Credit Agreement, the Pre-Petition Loan Documents, the US
18 Bank Loan Agreement, the Loan Documents, the Financing Order or the
19 Sale Order; (o) the Borrower (except following the Lender's prior written
20 request or with the Lender's express prior written consent) shall file a
21 motion with the Bankruptcy Court or any other court with jurisdiction in
22 the matter seeking an order, or an order is otherwise entered, modifying,
23 reversing, revoking, staying, rescinding, vacating, or amending the
24 Financing Order or any of the Loan Documents, without the Lender's
25 express prior written consent (and no such consent shall be implied from
26 any other action, inaction, or acquiescence of the Lender); (p) the
Borrower shall file, or any other person shall obtain Bankruptcy Court
approval of a disclosure statement for a plan of reorganization which does
not provide for the full, final, and irrevocable repayment of all of the
Obligations of the Borrower to the Lender upon the effectiveness of such
plan, unless the Lender has expressly joined in or consented to such plan
in writing; (q) the Borrower shall file any motion or application, or the
Bankruptcy Court allows the motion or application of any other Person,
which seeks approval for or allowance of any claim, lien, security interest
ranking equal or senior in priority to the claims, liens and security interests
granted to the Lender under the Financing Order or the Loan Documents
or any such equal or prior claim, lien, or security interest shall be
established in any manner, except, in any case, as expressly permitted
under the Financing Order; (r) the Bankruptcy Court shall not have
entered the Financing Order or the Financing Order shall cease to be in
full force and effect from and after the date of entry thereof by the
Bankruptcy Court; (s) the Bankruptcy Court shall not have entered a Cash
Collateral Order from and after the date of entry thereof by the Bankruptcy
Court on or before [May15, 2010]; (t) the entry of an order which provides
relief from the automatic stay otherwise imposed pursuant to Section 362
of the Bankruptcy Code, which order permits any creditor, other than the

1 Lender, to realize upon, or to exercise any right or remedy with respect to,
2 any asset of the Borrower or to terminate any license, franchise, or similar
3 agreement, where such termination could have a Material Adverse Effect;
4 (u) if any creditor of the Borrower receives any adequate protection
5 payment which is not fully acceptable to the Lender in its sole discretion,
6 or any Lien is granted as adequate protection other than as set forth in the
7 Financing Order; (v) Borrower suspends or discontinues, or is enjoined by
8 any court or governmental agency from continuing to conduct, all or any
9 material part of its business (in a manner inconsistent with the Substantial
10 Asset Disposition, the Substantial Asset Disposition Schedule, or such
11 other orderly wind-down acceptable to Lender), or if a trustee, receiver or
12 custodian is appointed for Borrower or any of its properties; (w)
13 conversion of the Chapter 11 Case to a Chapter 7 case under the
14 Bankruptcy Code, or dismissal of the Chapter 11 Case or any subsequent
15 Chapter 7 case either voluntarily or involuntarily; (x) the Financing Order
16 shall be modified, reversed, revoked, remanded, stayed, rescinded, vacated
17 or amended on appeal or by the Bankruptcy Court without the prior
18 written consent of Lender (and no such consent shall be implied from any
19 other authorization or acquiescence by Lender); (y) a trustee is appointed
20 pursuant to Sections 1104(a)(1) or 1104(a)(2) of the Bankruptcy Code; (z)
21 an examiner with special powers is appointed pursuant to Section 1104(a)
22 of the Bankruptcy Code; and (aa) the Borrower fails to comply with any of
23 the covenants, conditions and agreements contained herein or in any other
24 agreement, document or instrument at any time executed by Borrower in
25 connection herewith.
26

- (i) Waiver of Applicable Nonbankruptcy Law Relating to Perfection: The Order shall be sufficient and conclusive evidence of the validity, perfection, and priority of the postpetition liens without the necessity of filing or recording any financing statement or other instrument or document which may otherwise be required under the law of any jurisdiction or the taking of any other action (including, for the avoidance of doubt, entering into any deposit account control agreement) to validate or perfect the postpetition liens or to entitle the Lender to the priorities granted herein. *See* Order, at paragraph 4.
- (j) Challenge Period: A party in interest (other than the Debtor) has until no later than sixty days from the entry of the Order (or such later date agreed to in writing by the Lender) to commence an adversary proceeding challenging the extent, validity, perfection, priority and enforceability of the Pre-Petition Lender's liens or any other claims whatsoever of the Pre-Petition Lender, including any claims arising from or related to the fees, charges, interest, commissions and expenses charged by the Pre-Petition Lender prior to the Petition Date pursuant to the Pre-Petition Loan Agreement. *See* Order, at paragraph 5.

- 1 (k) Relief From Automatic Stay: The automatic stay imposed under
2 Bankruptcy Code section 362(a) is hereby modified pursuant to the terms
3 of the DIP Credit Agreement as necessary to (1) permit the Debtor to grant
4 the DIP Liens and to incur all liabilities and obligations to the DIP Lender
5 under the DIP Credit Agreement, the DIP Credit Facility and this DIP
6 Order, and (2) authorize the DIP Lender to retain and apply payments
7 hereunder. *See* Order, at paragraph 15(e).

8 **IV. RELIEF REQUESTED**

9 17. By this Motion, the Debtor seeks the entry of Order regarding the relief requested
10 herein. Such Order, will authorize the Debtor to obtain postpetition secured financing in an
11 aggregate amount of up to \$2,000,000.00, in accordance with the terms and conditions set forth
12 in the proposed DIP Credit Agreement between Debtor and Lender.

13 18. This Motion also seeks approval of the DIP Credit Agreement, the material terms
14 of which are described above.

15 **V. BASIS FOR RELIEF REQUESTED**

16 19. Approval of the DIP Credit Agreement will provide Debtor with immediate and
17 ongoing access to cash and borrowing availability to pay its current and ongoing expenses
18 through the anticipated sale of substantially all of its assets. Unless Debtor's expenses are paid,
19 it is likely that failure to pay such expenses will: (a) result in irreparable harm to the business, (b)
20 deplete the value of Debtor's estate and quash the opportunity for a sale, and (c) jeopardize
21 Debtor's ability to maximize the value of its estate. The credit provided under the DIP Credit
22 Agreement will enable Debtor to preserve and enhance the value of its estate for the benefit of all
23 stakeholders. Accordingly, the timely approval of the relief requested herein is imperative.

24 **A. The Postpetition Financing**

25 20. In order to prevent the harm that would result from a failure to obtain sufficient
26 debtor in possession financing, the Lender has agreed to provide Debtor with the DIP financing
on the terms described in this Motion, and more particularly, in the DIP Credit Agreement.

1 21. The Lender is willing to provide DIP financing to facilitate the sale and a
2 structured liquidation in chapter 11. Debtor has not been able to obtain postpetition financing or
3 other financial accommodations from any alternative prospective lender or group of lenders on
4 more favorable terms and conditions than those for which approval is sought herein. Thus,
5 undertaking this financing is consistent with Debtor's obligation to seek to maximize the value of
6 its assets for the benefit of creditors.
7

8 22. Section 364(c) of the Bankruptcy Code provides, among other things, that if a
9 debtor is unable to obtain unsecured credit allowable as an administrative expense under Section
10 503(b)(1) of the Bankruptcy Code, the Bankruptcy Court may authorize the debtor to obtain
11 credit or incur debt (a) with priority over any and all administrative expenses, as specified in
12 Section 503(b) or 507(a)(2) of the Bankruptcy Code, (b) secured by a lien on property of the
13 estate that is not otherwise subject to a lien, or (c) secured by a junior lien on property of the
14 estate that is subject to a lien. *See* 11 U.S.C. § 364(c). Section 364(d) provides that, in
15 appropriate circumstances, a debtor may incur debt secured by a senior, or "priming" lien.
16 Debtor proposes to obtain the financing set forth in the DIP Credit Agreement by providing the
17 Lender with, *inter alia*, a priming lien on all of Debtor's assets, as well as a superpriority claim,
18 pursuant to section 364(c)(1), (2), (3) and section 364(d) of the Bankruptcy Code. The DIP
19 financing being provided by Lender, in an amount up to \$2,000,000.00, will pay the secured
20 claim of U.S. Bank in full and need for allowing a priming lien pursuant to 11 U.S.C. § 364(d)
21 may not be necessary in this case.
22

23 23. Bankruptcy courts grant a debtor considerable deference in acting in accordance
24 with its business judgment. *See In re Ames Dep't Stores, Inc.*, 115 B.R. 34, 40 (Bankr. S.D.N.Y.
25 1990) ("cases consistently reflect that the court's discretion under Section 364 is to be utilized on
26

1 grounds that permit reasonable business judgment to be exercised so long as the financing
2 agreement does not contain terms that leverage the bankruptcy process and powers or its purpose
3 is not so much to benefit the estate as it is to benefit a party-in-interest”). *See also In re Funding*
4 *Systems Asset Management Corp.*, 72 B.R. 87, 88 (Bankr. W.D. Pa. 1987); *In re Simasko Prod.*
5 *Co.*, 47 B.R. 444, 449 (Bankr. D. Colo. 1985). Business decisions are made in the board room,
6 not the courtroom. *See Group of Institutional Investors v. Chicago Mil. St. P. & Pac. Ry.*, 318
7 U.S. 523, 550 (1943); *In re Simasko Prod. Co.*, 47 B.R. 444, 449 (D. Colo. 1985) (“Business
8 judgments should be left to the board room and not to this Court”); *In re Lifeguard Indus., Inc.*,
9 37 B.R. 3, 17 (Bankr. S.D. Ohio 1983) (same). “More exacting scrutiny would slow the
10 administration of the debtor’s estate and increase its costs, interfere with the Bankruptcy Code’s
11 provision for private control of administration of the estate, and threaten the court’s ability to
12 control a case impartially.” *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1311
13 (5th Cir. 1985).

14
15 24. The Debtor has exercised sound business judgment in determining that a
16 postpetition credit facility is appropriate and has satisfied the legal prerequisites to enter into the
17 financing pursuant to the terms of the DIP Credit Agreement. The terms of the DIP Credit
18 Agreement are fair and reasonable and are in the best interests of the Debtor’s estate. The
19 delays, cost and expense of placing this loan with a new lender, assuming one could be found,
20 would be detrimental to the estate and ultimately diminish creditor recoveries. Accordingly, the
21 Debtor should be granted authority to enter into the DIP Credit Agreement and borrow funds
22 from the Lender on the secured, administrative super-priority basis provided for therein and in
23 the Order, pursuant to section 364(d) of the Bankruptcy Code, and take the other actions
24 contemplated by the DIP Credit Agreement and the Order as requested herein.
25
26

1 25. Furthermore, Section 364(d) does not require that a debtor seek alternative
2 financing from every possible lender; rather, the debtor simply must demonstrate sufficient
3 efforts to obtain financing without the need to grant a senior lien. *See Bray v. Shenandoah Fed.*
4 *Savings & Loan Ass'n (In re Snowshoe Co.)*, 789 F.2d 1085, 1088 (4th Cir. 1986) (trustee was
5 not required to seek credit from every possible lender and the information provided regarding
6 unsuccessful contact with financial institutions in the geographic area was sufficient to establish
7 that credit was not available without granting a senior lien); *In re 495 Central Park Ave. Corp.*,
8 136 B.R. 626, 631 (Bankr. S.D.N.Y. 1992) (debtor testified to numerous failed attempts to
9 procure financing from various sources, explaining that “most banks lend money only in return
10 for a senior secured position”); *In re Aqua Assocs.*, 123 B.R. 192, 197 (Bankr. E.D. Pa. 1991)
11 (debtor adequately established that some degree of priming of loan was necessary if debtor was
12 to obtain funding).

13
14 26. Substantially all of the Debtor’s assets are encumbered by the U.S. Bank first
15 position security interest and the Debtor has been unable to procure the required funding absent
16 granting the proposed priming liens, superpriority claims, and liens. The Debtor submits that the
17 circumstances of these cases require the Debtor to obtain financing pursuant to section 364(c)
18 and section 364(d) of the Bankruptcy Code and, accordingly, the DIP Credit Agreement reflects
19 the exercise of the Debtor’s sound business judgment.

20
21 **B. The DIP Credit Agreement Terms are Fair, Reasonable, and Appropriate**

22 27. The proposed terms of the DIP Credit Agreement are fair, reasonable, and
23 adequate under the circumstances. First and foremost, Debtor has made a concerted, good-faith
24 effort to obtain credit on the most favorable terms that are available. As discussed above,
25 Debtor explored alternative sources of postpetition financing. Despite the best efforts of Debtor,
26

1 no other lender was willing to provide an adequate stand alone financing facility. Against this
2 backdrop, Debtor carefully evaluated the proposed financing structure from the Lender, engaged
3 in negotiations with the Lender regarding the proposed terms, worked with its attorneys to obtain
4 the best possible terms from the Lender and, eventually, agreed to the Lender's proposal as the
5 proposal best suited to Debtor's needs. In addition, the terms and conditions of the DIP Credit
6 Agreement were negotiated by the parties in good faith, and were instituted for the purpose of
7 enabling Debtor to meet ongoing expenses while in chapter 11 and implement an orderly sale
8 and of its assets for the benefit of creditors.
9

10 **C. The Automatic Stay Should Be Modified on a Limited Basis**

11 28. The relief requested herein contemplates a modification of the automatic stay to
12 permit Debtor to: (a) grant the security interests, liens, and superpriority claims described above
13 with respect to the Lender and to perform such acts as may be requested to assure the perfection
14 and priority of such security interests and liens; (b) permit the Lender to exercise, all rights and
15 remedies under the DIP Credit Agreement and the Order; and (c) implement the terms of the DIP
16 Credit Agreement and the Order.
17

18 Stay modifications of this kind are ordinary and standard features of postpetition debtor
19 financing facilities and, in Debtor's business judgment, are reasonable and fair under the present
20 circumstances.
21

22 **D. Professional Carveout**

23 29. Notwithstanding anything herein to the contrary, DIP Liens shall be subordinate
24 only to the to a carve-out for the payment of (i) the allowed claims of professionals on behalf of
25 Debtor or any Committee whose employment is approved by this Court, and (ii) the claim of the
26

1 United States Trustee for the payment of fees under 28 U.S.C. § 1930(a) (the "Professional
2 Carve-Out"). The Professional Carve-Out shall not exceed \$200,000.

3 **VI. NOTICE**

4 30. Notice of this Motion has been provided to: (i) the Office of the United States
5 Trustee, (ii) the Internal Revenue Service, (iii) Debtor's twenty (20) largest unsecured creditors,
6 (iv) counsel to Debtor, (v) counsel to the Pre-Petition Lenders (as defined below), (vi) counsel to
7 the proposed DIP Lender, (vii) US Bank National Association, and (viii) Associated Petroleum
8 Products, Inc. Debtor submits that, in light of the nature of the relief requested, no other or
9 further notice need be given.
10

11 **VII. NO PRIOR REQUEST**

12 No previous application for the relief sought herein has been made to this or any other court.

13 **VIII. CONCLUSION**

14 Debtor prays that the Court enter an order approving DIP pursuant to the terms and
15 conditions of the attached Exhibits A and B and grant additional relief as requested herein.
16

17 DATED this 25th day of March, 2010.
18

19
20 BRIAN L. BUDSBERG, PLLC

21
22 /s/ Brian L. Budsberg

23 Brian L. Budsberg, WSBA #11225

24 Benjamin J. Riley, WSBA #34949

25 Attorney's for the Debtor
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